Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

Fourth Circuit holds Guidelines' reasonable foreseeability analysis should be used to determine drug quantities for mandatory minimum sentences under 21 U.S.C. § 841(b). Two defendants in a large drug conspiracy were subject to ten-year minimum terms if they were held responsible for the full amount of drugs distributed by the conspir-acy. 21 U.S.C. §§ 846 and 841(b). However, under the Guidelines' reasonable foreseeability analysis a smaller quantity of drugs would be attributed to them and their sentences would be significantly lower. The district court sentenced them to the mandatory term using the full amount from the conspiracy, but also imposed alternative sentences under the Guidelines.

The appellate court held that it was improper to automatically use the full amount of drugs from the conspiracy for purposes of the mandatory minimum. The court looked to the statutes and legislative history to "conclude that the most reasonable interpretation of the relevant statutory provisions requires a sentencing court to assess the quantity of narcotics attributable to each coconspirator by relying on the principles set forth in *Pinkerton* [*v. U.S.*, 328 U.S. 640 (1946)]." To hold a defendant liable for acts of other conspirators under *Pinkerton*, "the act must be 'done in furtherance of the conspiracy' and 'be reasonably foreseen as a necessary or natural consequence of the' conspiracy."

The relevant conduct section of the Guidelines "incorporates the concept of reasonable foreseeability as described in *Pinkerton*" and should be used to "determine the application of § 841(b) for a defendant who has been convicted of § 846." The court held that "in order to apply § 841(b) properly, a district court must first apply the principles of *Pinkerton* as set forth in the relevant conduct section of the Sentencing Guidelines, U.S.S.G. § 1B1.3, to determine the quantity of narcotics reasonably foreseeable to each coconspirator within the scope of his agreement. If that amount satisfies the quantity indicated in § 841(b), the district court must impose the mandatory minimum sentence absent a higher sentencing range resulting from application of the Sentencing Guidelines. If the quantity is less than that set forth in § 841(b), the statutory mandatory minimum sentencing provision would not apply."

The court held that the alternative sentences imposed under the Guidelines in this case were proper, and remanded for amendment of the judgments.

U.S. v. Irvin, No. 91-5454 (4th Cir. Aug. 23, 1993) (Wilkins, J.).

See *Outline* at II.A.2 and 3.

CALCULATING WEIGHT OF DRUGS

U.S. v. Johnson, No. 91-1621 (7th Cir. July 29, 1993) (Lay, Sr. J.) (Remanded: For defendant convicted of possession with intent to distribute cocaine, it was error to include the weight of waste water in which a small amount of cocaine base was mixed. "The waste water does not serve as a dilutant, cut-ting agent or carrier medium for the cocaine base. It does not 'facilitate the distribution' . . . of the cocaine in that cocaine is not dependent on the water for ingestion, and unlike a dilutant or cutting agent, the waste water does not in any way increase the amount of drug available at the retail level. The liquid, with just a trace of cocaine base, is merely a by-product of the manufacturing process with no use or market value. . . . To read the statute or *Chapman* [*v. U.S.*, 111 S. Ct. 1919 (1991)] as requiring inclusion of the weight of all mixtures, whether or not they are useable, ingestible, or marketable, leads to absurd and irrational results contrary to congressional intent.").

See *Outline* at II.B.1.

General Application Principles

SENTENCING FACTORS

D.C. Circuit holds en banc that, after granting a reduction for acceptance of responsibility, the sentencing court may consider defendant's decision to go to trial when picking the sentence within the guideline range. Defendant was convicted at trial on a drug charge. The district court granted a § 3E1.1 reduction, but expressed reservations about giving defendant the full benefit of the two-point reduc-tion in light of his going to trial when "he, in effect, had no defense," and later made a "rather meager" acknowledgment of responsibility. The court stated that, if defendant had pled guilty before trial, it would "have sentenced him at the very bottom of the Guidelines," but because "the case did go to trial, I am going to add an additional six months to the guideline sentence that I intend to impose," and sentenced defendant to 127 months instead of 121. The original appellate panel affirmed, rejecting defendant's claim that he was punished for exercising his Sixth Amendment right to trial. *U.S. v. Jones*, 973 F.2d 928 (D.C. Cir. 1992) [5 *GSU* #3].

The en banc court affirmed, "although on narrower grounds. . . . [I]t is clear . . . that the district judge could not properly be described as enhancing defendant's punishment. Instead, in considering appellant's decision to admit guilt only after conviction, the judge merely viewed the appellant's timing as pertinent to the scope of the benefit he should receive. The judge decided he should give appellant less of a benefit than he would have allowed an otherwise identical defendant who showed greater acceptance of responsibility by acknowledging his guilt at an earlier stage."

The court added that, looking at the pre-adjustment guideline range as a "baseline sentence," "the sentencing judge appears simply to have given the defendant four-fifths of the possible credit for acceptance of responsibility (24 out of 30 possible months), explaining that if Jones had shown greater evidence of contrition (in this instance by pleading guilty), the judge would have made a greater adjustment." It was "legally relevant (and constitutionally unobjectionable)" for the district judge to conclude that, "within the 121–151 month range the

judge was bound to work within, Jones's limited remorse deserved only a 24-month reduction."

U.S. v. Jones, No. 91-3025 (D.C. Cir. July 2, 1993) (en banc) (Williams, J.) (three judges dissenting).
See *Outline* at I.C and III.E.4.

Relevant Conduct

U.S. v. Jenkins, No. 91-3553 (6th Cir. Aug. 20, 1993) (Joiner, Sr. Dist. J.) (Remanded: It was error to attribute to defendant all drugs distributed by the conspiracy on the basis that defendant "certainly could have reasonably foreseen" such amounts: "foreseeability is only one of the limitations on the ability of the court to charge one participant in a conspiracy with the conduct of the other participants. . . . Another limi-tation on the court's ability to charge a defendant with the conduct of others is that the conduct must be in furtherance of the execution of the 'jointly undertaken criminal activity.'" Thus, the district court must also determine "the scope of the criminal activity [defendant] agreed to jointly undertake.").
See *Outline* at I.A.1 and II.A.2.

Departures

Mitigating Circumstances

U.S. v. Restrepo, No. 92-1631 (2d Cir. July 26, 1993) (Kearse, J.) (Remanded: Although consideration of alienage is not prohibited by the Guidelines, it was improper to depart downward for defendant who faced deportation and other collateral consequences due to his status as a permanent resident alien. Consideration of "national origin" is prohibited by § 5H1.10, p.s., but national origin "is not synonymous with 'alienage,' i.e., simply not being a citizen of the country in which one is present. . . . Thus, the prohibition against consideration of national origin does not constitute a prohibition against consideration of alienage. . . . [T]o the extent that alienage is a characteristic shared by a large number of persons subject to the Guidelines, it is a characteristic that, for sentencing purposes, is not 'ordinarily relevant.' It remains, however, a characteristic that may be considered if a sentencing court finds that its effect is beyond the ordinary" in nature or degree. In this case, however, "none of the bases relied on by the district court, i.e., (1) the unavailability of preferred conditions of confinement, (2) the possibility of an additional period of detention pending deportation following the completion of sentence, and (3) the effect of deportation as banishment from the U.S. and separation from family, justified the departure."). *Cf. U.S. v. Alvarez-Cardenas,* 902 F.2d 734, 737 (9th Cir. 1990) ("possibility of deportation is not a proper ground for departure"); *U.S. v. Ceja-Hernandez,* 895 F.2d 544, 545 (9th Cir. 1990) (reversed upward departure based on fact that anticipated deportation after release precluded imposition of fine or supervised release).
See *Outline* generally at VI.C.4.b.

U.S. v. Ziegler, No. 92-3242 (10th Cir. July 23, 1993) (Brorby, J.) (Remanded: District court improperly departed downward for defendant's post-offense drug rehabilitation. "[W]e hold drug rehabilitation is taken into account for sentencing purposes under U.S.S.G. 3E1.1 (1991) and, therefore, rehabilitation is generally an improper basis for departure." Even in extraordinary or unusual cases rehabilitation is not a proper basis for departure: "Although [§ 5H1.4, p.s.] explicitly refers to drug dependence, not drug rehabilitation, we interpret this section as encompassing both phenomena because drug rehabilitation necessarily presupposes drug dependence. . . . A departure based upon drug rehabilitation re-wards drug dependency because only a defendant with a drug abuse problem is eligible for the departure. For this reason, we hold the Guidelines do not contemplate drug rehabilitation as a grounds for departure even in rare circumstances.").
See *Outline* at VI.C.2.a.

U.S. v. Gaither, No. 92-3222 (10th Cir. July 23, 1993) (Brorby, J.) (Reversed, in light of *Ziegler,* departure based on post-offense drug rehabilitation, but remanded for further findings on defendant's claim that departure was also based on his "exceptional acceptance of responsibility." Such a departure is proper only if "the district court finds the acceptance of responsibility to be so exceptional that it is 'to a degree' not considered by U.S.S.G. 3E1.1.").
See *Outline* at VI.C.4.c.

U.S. v. Sclamo, 997 F.2d 970 (1st Cir. 1993) (Affirmed: "Applying the modified standard of review for such cases recently announced in *U.S. v. Rivera,*" 994 F.2d 942 (1st Cir. 1993), the district court properly departed downward—from the 24–30 month range to probation with six months' home confinement—for defendant's unusual family circumstances. Defendant had been living with a divorced woman and her two children since 1989, and had developed a special relationship with the woman's son that had helped ameliorate the son's serious psychological and behavioral problems. Evidence that the son "would risk regression and harm if defendant were incarcerated amply supports the district court's deter-mination that Sclamo's relationship to James is sufficiently extraordinary to sustain a downward departure.").
See *Outline* at VI.C.1.a.

Determining the Sentence

Fines

U.S. v. Turner, No. 93-1148 (7th Cir. July 14, 1993) (Easterbrook, J.) (Remanded: The required cost-of-imprisonment fine, § 5E1.2(i), is authorized by statute. Case is remanded, however, because the district court imposed the fine after finding that defendant was unable to pay a punitive fine under § 5E1.2(a) and (c). Although the appellate court declined to hold that a cost-of-imprisonment fine may never be imposed unless a punitive fine is imposed first, it concluded that if defendant "cannot pay such a fine, then he cannot be expected to pay anything computed under sec. 5E1.2(i).").
See *Outline* at V.E.2.

Probation and Supervised Release

Revocation of Probation for Drug Possession

U.S. v. Sosa, 997 F.2d 1130 (5th Cir. 1993) (Affirmed: In sentencing defendant for revocation of probation for drug possession to "not less than one-third of the original sentence," 18 U.S.C. § 3565(a), "original sentence" refers to the length of probation and is not limited to the maximum original guideline sentence.).

Three courts have now held that "original sentence" refers to probation; four have held it is limited to the original guideline sentence. The Supreme Court granted certiorari in one of the latter cases. *See U.S. v. Granderson,* 113 S. Ct. 3033 (1993).
See *Outline* at VII.A.2.